

DISCUSSION

Religious Actors and Transitional Justice

On Legitimacy and Accountability

IOANA CISMAS — 13 May, 2015



A teary-eyed Desmond Tutu during a public hearing of the Truth and Reconciliation Commission is emblematic for the South African transitional justice (TJ) process to the extent that examining the Commission's work without recalling the archbishop's role in its functioning could be considered a scholarly faux-pas. Hence, the question emerges: is this a unique case or are there other Tutus out there? One [statistical effort](#) documents the significant involvement of religious actors in 8 of 10 strong truth commissions and 2 of 4 punitive processes (criminal prosecutions and vetting initiatives). Such trend is curious if one assumes that TJ is built on the same pillars as its sister discipline, international law: secularism and state-centrism. The present contribution aims to probe this apparent inconsistency.

Why are religious actors involved in state-sanctioned TJ?

In one perspective, the engagement with religious actors can be seen as an effort to strengthen the legitimacy of human rights and humanitarian law within different religious and cultural traditions by appealing to their 'special' legitimate authority. [Elsewhere](#), drawing on Max Weber's work, I have argued that the legitimacy of religious actors is primarily ascribed on traditional or charismatic grounds, as opposed to legal-rational ones. To illustrate the attraction of this 'special' legitimacy, let us recall [Daniel Thürer's acknowledgment](#) that 'law as such is powerless if it is not backed by forces beyond the legal system, such as customs, public opinion or — religion'. An appeal to religious actors would thus be validated when their religious interpretations support the law and rebutted when it endangers it. Relying on religious actors as a strategy to lend special legitimacy to TJ may carry particular weight in post-authoritarian and post-conflict settings, where claims and needs for both local ownership and external resources and structures are strong. Their support for and involvement in TJ mechanisms—which otherwise could be perceived as foreign and divorced from context—can prove instrumental. Indeed, [Aaron P. Boesenecker and Leslie Vinjamuri](#) show that, in addition to civil society organizations, faith-based actors can act as norm adaptors and are thus of crucial importance for 'embedding' an international criminal accountability norm in various contexts.

Should religious actors be involved in TJ?

A first objection to mixing religion and law can be termed the **legality argument**. On this view, international law owes its very legal quality to a conscious separation from religion. When applied to TJ, the legality argument carries some force. Over the past 20-30 years, 'a comprehensive approach to TJ' has increasingly been grounded in legal instruments. This 'new law' of TJ relies cumulatively upon human rights law, humanitarian law, and criminal law. Seeking the truth, pursuing criminal prosecutions, and reparation programs and, to a certain extent, institutional reforms are today binding legal obligations—moral, religious and other grounds would thus be of only secondary relevance. Be that as it may, calling upon religious actors to strengthen the legitimacy of TJ in various cultural contexts does not lead to a de-legalization (or a de-secularization) of TJ, nor does it transform its primary legal-rational source of legitimacy.

Second, a **neutrality argument** insists that the law must rest on secular foundations if it is to ensure equality and non-discrimination in a multi-religious and multi-cultural world. The involvement of religious actors in TJ may raise tensions in contexts where societies have experienced conflict across religious lines, or where a secular-religious cleavage exists. On the other hand, some argue it may assuage religious tensions and contribute to *personal* reconciliation when religious leaders of opposing parties seek to work together.

A certain religious neutrality of the work of TJ mechanisms is warranted. The African Commission on Human and Peoples' Rights' ruling that non-Muslims and Muslims alike have the right to be tried in non-religious courts if they so choose, would certainly also apply to criminal prosecutions of alleged perpetrators of past violations. Beyond this, when the proposition is embraced that TJ mechanisms must uphold the rule of law, which in its 'thick' form includes freedom of and from religion, one finds support for the argument that a (predominantly) religious character of a truth commission's sessions and its religiously-inspired findings may frustrate the rights of certain victims and alleged perpetrators. A victim-centered approach to truth-seeking would also sanction a certain neutrality, as some victims may feel uncomfortable with the religious contours of a truth commission. Even so, the mere presence of religious actors in truth commissions would not as such vitiate the rule of law requirement.

A third separationist claim could be called the **denial/distortion of justice argument**. It fears that the involvement of religious actors in TJ may result in a denial of justice or its distortion into 'softer' forms. Some see the actions of religious actors in TJ animated by a logic of reconciliation grounded in forgiveness; this could lead them to advocate for amnesties. To the extent that these are blanket amnesties or frustrate the right of victims to a remedy and reparation they would collude with international law. One must acknowledge that amnesties are promoted by a variety of actors, and governments, including secular ones, have by far outdone religious actors. But certainly, there have been cases where religious entities have specifically advocated amnesties such as in Mozambique and Sierra Leone, and Uganda.

Accountability: the limit of religious actors' involvement in TJ

Each of these three arguments holds some merit and indicates the limitations of religious actors' involvement in TJ. Yet, my research reveals that the strongest limit to such involvement is the actors' own legitimacy (or lack thereof), which in turn is intimately linked to their accountability (or lack thereof). I reached this conclusion by linking the roles of religious actors in the period of redress (or TJ) to the part they played in the

period to be redressed. The roles of religious actors in authoritarianism or conflict, as mediators, victims, accomplice to, or perpetrators of violations can shed light on the roles which they assume in TJ processes, as advocates, agents or spoilers of TJ, or indeed on their absence from such initiatives.

For example, during the Solomon Islands conflict, churches and women who typically conduct their activities through church groups worked as indispensable providers of emergency relief and services to victims and their families, and as mediators between rival armed groups: they blended both capacity and legitimacy. Post-conflict, they became champions of grassroots reconciliation, as well as advocates and agents of TJ, including by assuming leading roles in disarmament initiatives.

On the other hand, in Rwanda, where clerics of established Christian churches were among those accused for their role in the genocide (including at the ICTR), religious actors were largely absent from state-sanctioned TJ mechanisms. The government specifically excluded members of 'leading organs of ... a religious confession' from membership of Gacaca courts. Anecdotal evidence suggests that the number of followers of Islam grew after the genocide because 'Muslims seemed to have given a good account of themselves during the massacres'—to buttress the link between accountability and legitimacy, post-genocide we find Rwanda's Mufti as a driving force of grassroots reconciliation.

My research also found that the roles of religious entities in the period to be redressed may influence the form of TJ they pursue; in addition to a religious logic of forgiveness, this can also be shaped by 'less-sacred' aspects such as economic and political interests or reputational loss.

To illustrate, in Romania, the Orthodox Church had a triadic position during the communist regime: victim of repression, beneficiary of human rights violations (through the transfer of church property of other denominations), and possible accomplice in violations given its extensive collaboration with the regime. Post 1989, the Orthodox Church again played a triadic role: memorializer – spoiler – opponent. Keen to memorialize its own victimhood episodes to explain or legitimize its accommodation with the regime, it was reluctant to engage in property restitution and vehemently opposed disclosure of details of its collaboration with the secret police likely to protect its economic and reputational interests.

In Tunisia, members of the Mouvement de Tendances Islamiques (re-named Ennahda) suffered human rights violations at the hands of the Bourguiba and Ben Ali regimes and their organization was largely excluded from political processes. Post-revolution, victimhood was a key element which drove Ennahda's TJ efforts; however, its search for accountability was also an attempt to strengthen its legitimacy and political credentials. The political exclusion draft laws offer an illustration. Unlike vetting initiatives, which seek to remove personnel based on individual responsibility in gross human rights violations, political exclusion as promoted by Ennahda (and ultimately renounced by several members of the party) aimed instead to remove individuals (loosely) affiliated to the former regime.

Conclusion: a continuing role in changing contexts

TJ was originally developed as a response to transitions in the Southern Cone of Latin America with the goal to redress gross human rights violations of authoritarian states – hence it was generally acknowledged that the state with its existing strong institutions

could and should repair violations. Much of the TJ practice and literature therefore concentrated on improving state action, although, even in such 'traditional' transitions, non-state actors, including religious leaders and organizations, were instrumental. In post-conflict, conflict and fragile settings, where TJ measures are currently employed, the presence and role of non-state actors is heightened. Such contexts often involve weak or corrupt state institutions, mass poverty and marginalization; moreover, perpetrators tend to be numerous and include a wide array of non-state actors.

On this account, it appears clear that the involvement of religious actors in TJ is to continue: as advocates and agents of TJ, pursuing an agenda of reconciliation, or seeking more retributive measures, at times animated by economic or political gains; as perpetrators and accomplices in human rights violations which are to be redressed through TJ; or as spoilers. The interest of states to call upon religious entities as advocates or agents of TJ depends upon their potential to lend legitimacy to such processes, which in turn is intimately linked to their accountability. In that way, as with TJ in general, there is no one-size-fits-all solution.

A response to this post can be found [here](#).

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